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No. 00-853

In The

Supreme Court of the United States

CORRECTION OFFICER PORTER AND
CORRECTION OFFICER WILLETTE,

Petitioners,

v.

RONALD NUSSLE,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Did the Court of Appeals erroneously conclude, contrary to other courts of appeals, that an inmate bringing a claim for excessive force need not have exhausted available administrative remedies pursuant to the Prison Litigation Reform Act's mandatory exhaustion requirement, 42 U.S.C. § 1997e(a)?

TABLE OF CONTENTS

Page

QUESTION PRESENTED..... i

TABLE OF CONTENTS..... ii

TABLE OF AUTHORITIES..... iv

STATEMENT OF THE FACTS..... 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 2

I. THIS ACTION IS NOT ONE INVOLVING "PRISON CONDITIONS" AS IT ARISES UNDER 42 U.S.C. § 1983 AND IS A CLAIM THAT AN INMATE WAS THE VICTIM OF VIOLENCE BY STATE ACTORS INSPIRED BY THE SADISTIC DESIRE TO CAUSE PAIN..... 3

II. THE PRISON LITIGATION REFORM ACT'S USE OF THE TERM "PRISON CONDITIONS" DOES NOT APPLY TO CLAIMS OF RANDOM, ISOLATED AND UNAUTHORIZED EXCESSIVE FORCE 6

III. THE PHRASE "ACTION . . . WITH RESPECT TO PRISON CONDITIONS" DOES NOT ENCOMPASS ACTIONS INVOLVING RANDOM AND UNAUTHORIZED ACTS OF SADISTIC VIOLENCE..... 9

A. THE ORDINARY, CONTEMPORARY, AND COMMON MEANING OF THE TERM "PRISON CONDITIONS" DOES NOT INCLUDE CLAIMS INVOLVING SADISTIC ACTS OF VIOLENCE..... 10

TABLE OF CONTENTS – Continued

Page

B. THE COURT'S WELL-ESTABLISHED EIGHTH AMENDMENT PRECEDENTS DISTINGUISH BETWEEN "PRISON CONDITIONS" AND "EXCESSIVE FORCE" CLAIMS..... 12

C. CONGRESS' PRESUMED FAMILIARITY WITH THIS COURT'S QUALIFIED IMMUNITY DOCTRINE FURTHER INDICATES A LACK OF INTENT TO REQUIRE EXHAUSTION IN CASES INVOLVING RANDOM AND UNAUTHORIZED ACTS OF SADISTIC VIOLENCE..... 19

D. THE COURT SHOULD NOT IMPORT THE DEFINITION OF "PRISON CONDITIONS" FROM A DIFFERENT SECTION OF THE UNITED STATES CODE INTO SECTION 1997e(a)..... 21

IV. THE PLRA'S LEGISLATIVE HISTORY SUGGESTS THAT SECTION 1997e(a) DOES NOT APPLY TO CLAIMS OF EXCESSIVE FORCE... 26

CONCLUSION 28

TABLE OF AUTHORITIES

Page

CASES

Asgrow Seed Co. v. Winterboer, 513 U.S. 179 (1995) 11

Atlantic Cleaners and Dyers, Inc. v. United States, 288 U.S. 427 (1932) 23

Bell v. Wolfish, 441 U.S. 520 (1979) 12

Booth v. Churner, 121 S.Ct. 1819 (2001).....16, 25

Booth v. Churner, 206 F.3d 289 (3d Cir. 2000).....16, 25

Dewsup v. Timm, 502 U.S. 410 (1992) 24

District of Columbia v. Carter, 409 U.S. 418 (1973) 24

Estelle v. Gamble, 429 U.S. 97 (1976) 5

Farmer v. Brennan, 511 U.S. 825 (1994).....5, 13, 18

Heck v. Humphrey, 512 U.S. 477 (1994).....7

Hudson v. McMillian, 503 U.S. 1 (1992) .. 4, 5, 6, 13, 18, 20

Hutto v. Finney, 437 U.S. 678 (1978) 12

Johnson v. Glick, 481 F.2d 1028 (2d Cir. 1973) 20

Johnson v. United States, 529 U.S. 694 (2000) 11, 19

Lennon v. Miller, 66 F.3d 416 (2d Cir. 1995).....20

Malley v. Briggs, 475 U.S. 335 (1986).....20

McCarthy v. Bronson, 500 U.S. 136 (1991) 16, 18, 19

Mertens v. Hewitt Assoc., 508 U.S. 248 (1993).....22

Miller v. French, 530 U.S. 327 (2000).....22

N.L.R.B. v. Amax Coal Co., 453 U.S. 322 (1981).....15

TABLE OF AUTHORITIES – Continued

Page

Nussle v. Willette, 224 F.3d 95 (2d Cir. 2000) .. 1, 19, 21, 24

Patsy v. Board of Regents, 457 U.S. 496 (1982) 7, 8

Perrin v. United States, 444 U.S. 37 (1979).....11

Preiser v. Rodriguez, 411 U.S. 496 (1973) 19

Procunier v. Martinez, 416 U.S. 396 (1974).....12

Ratzlaf v. United States, 510 U.S. 135 (1994).....10

Rhodes v. Chapman, 452 U.S. 337 (1981).....5, 12

Saucier v. Katz, 121 S.Ct. 2151 (2001) 20

Stone v. INS, 514 U.S. 386 (1995).....9

United States v. United States Gypsum Co., 438 U.S. 422 (1978).....15

United States v. Wells, 419 U.S. 482 (1997) 18

Whitley v. Albers, 475 U.S. 312 (1992).....4, 18

Wilkerson v. Utah, 99 U.S. 130 (1879) 6

Williams v. Taylor, 529 U.S. 420 (2000) 15

Wilson v. Seiter, 501 U.S. 294 (1991) 17

STATUTES

18 U.S.C. § 3626.....21, 22, 23, 24, 25

18 U.S.C. § 3626(g)(2).....21, 22, 24, 26

28 U.S.C. § 636(b)(1)(B).....16, 18

42 U.S.C. § 1983.....4, 7, 18

42 U.S.C. § 1997e.....7, 8, 16

42 U.S.C. § 1997e(a) ..... *passim*

TABLE OF AUTHORITIES – Continued

Page

OTHER AUTHORITIES

Scalia, Antonin, *A Matter of Interpretation* (Princeton, 1997) 11

141 Cong. Rec. S14317 (daily ed. Sept. 26, 1995)..... 18

141 Cong. Rec. S14418 (daily ed. Sept. 27, 1995)..... 26

Wittgenstein, *Philosophical Investigation* (Blackwell, 1953)..... 11

STATEMENT OF THE FACTS

Ronald Nussle, an inmate in the custody of the Connecticut Department of Correction, was savagely and sadistically beaten by two prison guards on June 15, 1996. The guards beat him so badly he lost control of his bowels, and he was warned by the guards that he would be killed if he reported the beating. (Complaint, ¶¶ 3, 10-12).

On June 10, 1999, Mr. Nussle filed a Complaint in the United States District Court for the District of Connecticut. The District Court found that because Mr. Nussle had not filed an administrative grievance against his jailers, he had failed to exhaust his administrative remedies under the Prison Litigation Reform Act of 1995, Pub. L. No. 104-134, 110 Stat. 1321-73 (1996) (PLRA), *codified at* 42 U.S.C. § 1997e(a). The act provides that "no action shall be brought with respect to prison conditions . . . until such remedies as are available are exhausted."

The United States Court of Appeals for the Second Circuit reversed the District Court's determination that a sadistic, random and unauthorized beating is a "prison condition" within any conceivable reading of the PLRA. *Nussle v. Willette*, 224 F.3d 95, 106 (2d Cir. 2000). Thereafter, the petitioners in this case sought certiorari, which was granted. The petitioners and amici now come to this Court to argue that malice, sadism and savagery at the hands of state employees is as much a condition of prison life as being served institutional food, and being required to sleep in bunk beds.

SUMMARY OF THE ARGUMENT

The Prison Litigation Reform Act's (PLRA) exhaustion requirement was intended to deter frivolous litigation by prison inmates by requiring that prisoners first make administrative complaints before turning to the courts to litigate claims arising from prison conditions. Nothing in the text of the act itself, the legislative history of the act, or in this Court's Eighth Amendment jurisprudence supports a theory that random, unauthorized acts of sadistic violence by state employees are a prison condition.

Indeed, this Court's Eighth Amendment jurisprudence makes clear that there is a bright line distinguishing random and unauthorized acts of sadistic violence from prison conditions. Given the presumption that Congress is aware of this Court's decisions, and the lack of anything in the legislative history of the PLRA supporting a claim that virtual lawlessness was viewed by Congress as a prison condition, it is clear that exhaustion of excessive force claims is not required under the PLRA.

ARGUMENT

An inmate who is the victim of a sadistic beating by a prison guard and then files suit is not making a complaint about "prison conditions". Congress did not intend to require that acts amounting to criminal behavior be treated as a condition of confinement. The position advanced by petitioners is inconsistent with both the language and the structure of the Prison Litigation Reform Act, which convey a clear intent to limit the

exhaustion requirement to cases challenging conditions of confinement, not isolated claims of intentional assault by individual correctional officers. Moreover, petitioners' interpretation of the Act as applying to every kind of prisoner lawsuit is contrary to this Court's Eighth Amendment jurisprudence, which recognizes a clear distinction between claims of excessive force and actions challenging conditions of confinement.

I. THIS ACTION IS NOT ONE INVOLVING "PRISON CONDITIONS" AS IT ARISES UNDER 42 U.S.C. SECTION 1983 AND IS A CLAIM THAT AN INMATE WAS THE VICTIM OF VIOLENCE BY STATE ACTORS INSPIRED BY THE SADISTIC DESIRE TO CAUSE PAIN

Ronald Nussle is an inmate in the custody of the State of Connecticut. In his complaint, he alleges that on June 15, 1996, he was savagely beaten by his jailers to the point that he lost control of his bowels. He was then threatened with death if he reported the incident. On behalf of his jailers, the petitioners and amici contend that these beatings and threats are mere conditions of confinement, and urge this Court to adopt a rule of law that would equate the term prison conditions with random, unauthorized and individual acts of sadism and brutality. This Court has long recognized that application of the Bill of Rights does not stop at the jail house door, and there is no reason to begin now to believe that Congress intended to sanction, or did sanction, anarchy behind prison walls.

Mr. Nussle's case arises under the Eighth Amendment to the United States Constitution and its prohibition

against cruel and unusual punishment. It was filed under 42 U.S.C. § 1983. That section provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

The case law is clear and unambiguous: "[T]he unnecessary and wanton infliction of pain . . . constitutes cruel and unusual punishment forbidden by the Eighth Amendment." *Whitley v. Albers*, 475 U.S. 312, 319, 106 S.Ct. 1078, 1084 (1992). As this Court has recognized, there are times when the administration of pain is part of prison administration. Force may be necessary, for example, to put down a prison disturbance. " 'The question whether the measure taken inflicted unnecessary and wanton pain and suffering ultimately turns on whether force was applied in a good faith effort to maintain or restore discipline or maliciously and sadistically for the very purpose of causing harm,' " *Hudson v. McMillian*, 503 U.S. 1, 6, 112 S.Ct. 995, 999 (1992); *Whitley*, 475 U.S. at 320-321, 106 S.Ct. at 1085; or that officials used force with "a knowing willingness that harm occur." *Id.*, at 7, 112 S.Ct., at 99.

This Court recognizes the obvious distinction between excessive force claims and "claims based on conditions of confinement". *Hudson*, at p. 11. "To deny . . . the difference between punching a prisoner in the face and serving him unappetizing food is to ignore the concepts of dignity, civilized standards, humanity, and decency that animate the Eighth Amendment." *Id.*, at 11 (quotation marks omitted); *Estelle v. Gamble*, 429 U.S. 97, 102, 97 S.Ct. 285, 290 (1976).

Being violently assaulted in prison simply is not "part of the penalty that criminal offenders pay for their offenses against society." *Farmer v. Brennan*, 511 U.S. 825, 834, 114 S.Ct. 1970, 1977 (1994), *Rhodes v. Chapman*, 452 U.S. 337, 347, 101 S.Ct. 2392, 2400 (1981). Claims of excessive force in the prison context are different from routine conditions of confinement claims, or from claims arising from a denial of medical treatment.

> The objective component of an Eighth Amendment claim is therefore contextual and responsive to "contemporary standards of decency." *Estelle, supra*, 429 U.S., at 103, 97 S.Ct., at 290. For instance, extreme deprivations are required to make out a conditions-of-confinement claim. Because routine discomfort is "part of the penalty that criminal offenders pay for their offenses against society," *Rhodes, supra*, 452 U.S., at 347, 101 S.Ct., at 2399, "only those deprivations denying 'the minimal civilized measure of life's necessities' are sufficiently grave to form the basis of an Eighth Amendment violation." *Wilson, supra*, 501 U.S., at 298, 111 S.Ct., at 2324 (quoting *Rhodes, supra*, 452 U.S., at 347, 101 S.Ct., at 2399) (citation omitted). A similar analysis applies to medical needs. Because society does

not expect that prisoners will have unqualified access to health care, deliberate indifference to medical needs amounts to an Eighth Amendment violation only if those needs are "serious." See *Estelle v. Gamble*, 429 U.S., at 103-104, 97 S.Ct., at 290-291. In the excessive force context, society's expectations are different. When prison officials maliciously and sadistically use force to cause harm, contemporary standards of decency always are violated. See *Whitley, supra*, 475 U.S., at 327, 106 S.Ct., at 1088. This is true whether or not significant injury is evident. Otherwise, the Eighth Amendment would permit any physical punishment, no matter how diabolic or inhuman, inflicting less than some arbitrary quantity of injury. Such a result would have been as unacceptable to the drafters of the Eighth Amendment as it is today. See *Estelle, supra*, 429 U.S., at 102, 97 S.Ct., at 290 (proscribing torture and barbarous punishment was "the primary concern of the drafters" of the Eighth Amendment); *Wilkerson v. Utah*, 99 U.S. 130, 136, 25 L.Ed. 345 (1879) ("[I]t is safe to affirm that punishments of torture . . . and all others in the same line of unnecessary cruelty, are forbidden by [the Eighth Amendment]").

Hudson, 503 U.S. at pp. 8-9.

II. THE PRISON LITIGATION REFORM ACT'S USE OF THE TERM "PRISON CONDITION" DOES NOT APPLY TO CLAIMS OF RANDOM, ISOLATED AND UNAUTHORIZED EXCESSIVE FORCE

Exhaustion of administrative remedies is not generally a prerequisite to maintaining an action under 42

U.S.C. § 1983 and statutory exceptions to this rule must be construed narrowly. *Patsy v. Board of Regents*, 457 U.S. 496, 508 (1082); *see also Heck v. Humphrey*, 512 U.S. 477 (1994). As this Court recognized in *Patsy*: "The very purpose of [Section] 1983 was to interpose the federal courts between the State and the people, as guardians of the people's federal rights – to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative, or judicial.' " *Patsy*, 457 U.S. at 503 (citations omitted). In *Patsy*, this Court was unwilling to create a sweeping exhaustion requirement for 1983 claims absent explicit authorization of such a requirement by Congress. Although *Patsy* was decided well before the recent amendments to the PLRA, the language of the case is instructive, showing, as it does, this Court's recognition of the complexity of 1983 claims and indicating, as it does, that this Court has long recognized the fact that not all 1983 claims are alike. "The very variety of claims, claimants, and state agencies involved in [Section] 1983 claims argues for congressional consideration of the myriad of policy considerations, and may explain why Congress, in deciding whether to require exhaustion in certain [Section] 1983 actions brought by adult prisoners, carved out such a narrow, detailed exception to the no-exhaustion rule. After full debate and consideration of the various policy arguments, Congress adopted [Section] 1997e, taking the largest class of [Section] 1983 actions and constructing an exhaustion requirement that differs substantially" from other types of claims. "It is not for us to say whether Congress will or should create a similar scheme for other categories of [Section] 1983 claims. . . . " *Patsy* at p. 11.

Despite this general rule of non-exhaustion, Congress has carved out an exception in certain cases brought by prisoners. The first inmate exhaustion provision was enacted in 1980 as part of the Civil Rights of Institutionalized Persons Acts (CRIPA), which was codified at 42 U.S.C. § 1997e.[1] The provision was only a narrow exception to the general rule on non-exhaustion, *see Patsy*, 457 U.S. at 508, that provided a discretionary mechanism by which courts could require prisoners to exhaust prison grievance procedures before bringing suit under § 1983.

When Congress enacted the PLRA in 1996, it amended the exhaustion provision contained in Section 1997e(a), significantly expanding its scope by making it mandatory, rather than discretionary. The new version of Section 1997e reads as follows:

> No action shall be brought with respect to prison conditions under section 1983 of this title, or any other federal law, by a prisoner confined in any jail, prison, or other correctional facility until such administrative remedies as are available are exhausted.

[1] It read as follows: "(1) Subject to the provisions of paragraph (2), in any action brought pursuant to section 1979 of the Revised Statutes of the United States (42 U.S.C. 1983) by an adult convicted of a crime confined in any jail, prison, or other correctional facility, the court shall, if the court believes such a requirement would be appropriate and in the interests of justice, continue such case for a period not to exceed 180 days in order to require exhaustion of such plain, speedy, and effective administrative remedies as are available.

"(2) The exhaustion of administrative remedies under paragraph (1) may not be required unless the Attorney General has certified or the court has determined that such administrative remedies are in substantial compliance with the minimum acceptable standards promulgated under subsection (b) or are otherwise fair and effective."

42 U.S.C. § 1997e(a) (Supp. 2000). At the same time that it expanded the scope of Section 1997e(a), the PLRA also limited the applicability of the act to federal actions that are brought **with respect to prison conditions**. Thus, whereas the prior act provided for discretionary exhaustion of any and all claims arising under 42 U.S.C. § 1983, the amended act requires only those federal claims targeted at prison conditions be subject to the now mandatory exhaustion requirement.

The petitioners in this case seek to have this Court focus only on that portion of the PLRA that requires exhaustion. The limitation of the PLRA's applicability to cases involving prison conditions is also significant; in this case it is critically so. The PLRA is now mandatory, but only with regard to claims about conditions of confinement.

III. THE PHRASE "ACTION . . . WITH RESPECT TO PRISON CONDITIONS" DOES NOT ENCOMPASS ACTIONS INVOLVING RANDOM AND UNAUTHORIZED ACTS OF SADISTIC VIOLENCE

"When Congress acts to amend a statute, the amendment is presumed to have real and substantial effect." *Stone v. INS*, 514 U.S. 386, 397 (1995). By adding the language "with respect to prison conditions" to Section 1997e(a), Congress must have meant to limit the scope of that section – otherwise, the new language would be

superfluous. *See Ratzlaf v. United States*, 510 U.S. 135, 140-41 (1994) (courts should avoid interpreting statutory language in a manner that renders other textual provisions superfluous or unnecessary).

An act of sadistic violence does not give rise to a claim an action "brought with respect to prison conditions." To suggest otherwise is to strain the text, structure, legislative history and purpose of the amended version of Section 1997e(a) beyond recognition.

A. The Ordinary, Contemporary, and Common Meaning of the Term "Prison Conditions" Does Not Include Claims Involving Sadistic Acts of Violence

The most natural reading of the exhaustion provision of the PLRA is that the phrase "action . . . with respect to prison conditions" is limited to complaints about widespread and virtually universal circumstances of prison life, such as overcrowding, poor medical care, health and safety hazards. Only this reading conforms with the common usage of the phrase "prison conditions," this Court's understanding of that meaning in its Eighth Amendment jurisprudence, and Congress' use of identical language in related contexts.

Consider first the very plain and ordinary words of the PLRA. Exhaustion is required before any claim can be brought to our courts "with respect to prison conditions." The only real question here is the meaning of the term "prison conditions."

Statutory language must be read according to its "ordinary, contemporary, common meaning."[2] *Perrin v. United States*, 444 U.S. 37, 42 (1979). This is particularly true where, as here, the term used in a statute is undefined. *See Asgrow Seed Co. v. Winterboer*, 513 U.S. 179, 187 (1995). By common usage, the term "prison conditions" refers to the ordinary circumstances of prison life. Such circumstances can range from aspects of the physical environment, *e.g.*, the provision of adequate living space, food, clothing, and medical care, to policies pertaining to access to legal counsel and disciplinary procedures. But it strains the "ordinary, contemporary, common meaning" of the phrase beyond all reason to suggest that a guard who engages in a random and unauthorized act of violence has created a "prison condition."

As Justice Scalia commented in *Johnson v. United States*, 529 U.S. 694 (2000), "the acid test of whether a word can reasonably bear a particular meaning is whether you could use the word in that sense at a cocktail party without having people look at you funny." *Id.* at 718 (Scalia, J., dissenting). On the petitioner's theory of this case, the following colloquy would be unremarkable at a cocktail party:

> Nigel: "So, Quenton, how was your day today? I understand you've recently taken work as a prison guard?"

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[2] "[T]he meaning of a word is its use in the language." Wittgenstein, *Philosophical Investigations* (Blackwell, 1953) p. 43. These words, though philosophical, resonate throughout Justice Antonin Scalia's warning about the dangers of judicial fancy in statutory construction. Scalia, Antonin, *A Matter of Interpretation* (Princeton, 1997) pp. 12-14.

> Quenton: "Nothing unusual really happened today. Same old thing. I did beat a man so badly today that he lost control of his bowels, but I warned him not to tell my supervisor."

Surely this colloquy would be remarkable. Or, to put it in another, more chilling and tragic context, no one working in lower Manhattan on September 11, 2001, would view terrorism as a condition of employment on the island. Some things are beyond the pale, whether at work in a city, or confined behind bars. Random and unauthorized acts of sadistic violence are never acceptable conditions in a civilized society.

B. The Court's Well-Established Eighth Amendment Precedents Distinguish Between "Prison Conditions" and "Excessive Force" Claims

Consistent with common usage, the Court has employed the term "prison conditions" in a myriad of cases to describe the ordinary circumstances of prison life. *See, e.g., Hutto v. Finney*, 437 U.S. 678 (1978) (challenging cell size, sleeping arrangements, food, working conditions and widespread incidence of prisoner-on-prisoner violence); *Rhodes v. Chapman*, 452 U.S. 337 (1981) (challenging overcrowding); *Bell v. Wolfish*, 441 U.S. 520 (1979) (challenging a "potpourri" of generalized policies, including those limiting prisoner access to publications, authorizing random shake-downs, and mandating body-cavity searches after visits); *Procunier v. Martinez*, 416 U.S. 396 (1974) (challenging, *inter alia*, regulations limiting prisoners' access to mail).

More recently, the Court has drawn a sharp distinction between actions that challenge "prison conditions"

and those alleging "excessive force." In *Hudson v. McMillian*, 503 U.S. 1 (1992), the Court directly addressed this distinction:

> [E]xtreme deprivations are required to make out a conditions-of-confinement claim. Because routine discomfort is part of the penalty that criminal offenders pay for their offenses against society, only those deprivations denying the minimal civilized measure of life's necessities are sufficiently grave to form the basis of an Eighth Amendment violation. . . .
>
> In the excessive force context, society's expectations are different. When prison officials maliciously and sadistically use force to cause harm, contemporary standards of decency always are violated.

Id. at 9 (internal quotation marks and citations omitted).

The Court rejected as "unfounded" the argument that claims based on excessive force and claims based on prison conditions are no different in kind, and pointed out the obvious: **"To deny the difference between punching a prisoner in the face and serving him unappetizing food is to ignore the concepts of dignity, civilized standards, humanity, and decency that animate the Eighth Amendment."** *Id.* at 11 (internal citations omitted) (emphasis added).

Two years later, the Court reaffirmed this distinction in *Farmer v. Brennan*, 511 U.S. 825 (1994):

> [A]pplication of the deliberate indifference standard is inappropriate **in one class of prison cases**: when officials stand accused of using excessive physical force. In such situations,

> where the decisions of prison officials are typically made in haste, under pressure, and frequently without the luxury of a second chance, an Eighth Amendment claimant must show more than indifference, deliberate or otherwise. The claimant must show that officials applied force maliciously and sadistically for the very purpose of causing harm, or, as the Court also put it, that officials used force with a knowing willingness that [harm] occur. **This standard of purposeful or knowing conduct is not, however, necessary to satisfy the *mens rea* requirement of deliberate indifference for claims challenging conditions of confinement; the very high state of mind prescribed by *Whitley* does not apply to prison conditions cases.**

Id. at 835-36 (internal citations and quotation marks omitted) (emphasis added); *see also id.* at 832 ("In its prohibition of 'cruel and unusual punishment,' the Eighth Amendment places restraints on prison officials, who may not, for example, use excessive physical force against prisoners. The Amendment also imposes duties on these officials, who must provide humane conditions of confinement; prison officials must ensure that inmates receive adequate food, clothing, shelter, and medical care, and must take reasonable measures to guarantee the safety of inmates.").

When Congress enacted the PLRA, it presumably was aware of the Court's well-settled distinction between "conditions-of-confinement" claims, on the one hand, and "excessive force" claims, on the other. "Where Congress uses the terms that have accumulated settled meaning under either equity or the common law, a court must infer, unless the statute dictates, that Congress means to

incorporate the established meaning of these terms." *N.L.R.B. v. Amax Coal Co.*, 453 U.S. 322, 330 (1981); *see also Williams v. Taylor*, 529 U.S. 420, 434 (2000) ("When the words of the Court are used in a later statute governing the same subject matter, it is respectful of Congress and of the Court's own processes to give the words the same meaning in the absence of specific direction to the contrary."); *United States v. United States Gypsum Co.*, 438 U.S. 422, 437 (1978) (courts often discern congressional intent by reading the text of the statute in the light of the legal principles that operate in the relevant areas of the law). Because Congress must be presumed not to have legislated in derogation of this Court's well-established Eighth Amendment jurisprudence, petitioners' attempt to erase the clear distinction between "prison conditions" and "excessive force" cases should be rejected.

Petitioners devote a large portion of their brief to a refutation of the Second Circuit's distinction between "single incidents" (which the court found were not subject to the exhaustion requirement) and systemic prison-wide problems (which the court found were subject to Section 1997e(a)). *See* Pet. Br. 12-19. This argument has only superficial appeal, and ignores the complexity of this Court's decisions regarding this issue.

The Second Circuit reasoned that Congress must have had something in mind when it drafted the PLRA and chose to refer to "prison conditions." "[T]he term 'conditions,' used in its plural form, denotes 'attendant circumstances' or an 'existing state of affairs' – as exemplified by such ordinary phrases as 'living conditions,' 'playing conditions,' and 'adverse weather conditions.'

WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 473 (1961). Thus, " 'prison conditions' in [Section] 1997e would appear to refer to 'circumstances affecting everyone in the areas affected by them,' rather than 'simple or momentary matter[s], such as beatings or assaults, that are directed at particular individuals.' " *Nussle*, JA p. 62, *citing Booth v. Churner*, 206 F.3d 289, 300-01 (3d Cir. 2000) (Noonan, J., concurring and dissenting); *rev'd on other grounds, Booth v. Churner*, 121 S.Ct. 1819 (2001).

In *McCarthy v. Bronson*, 500 U.S. 136, 139-43 (1991), this Court rejected an argument facially similar to that advanced here. In that case, the Court interpreted Congress' used the term "conditions of confinement" in the Magistrates Act as codified at 28 U.S.C. § 636(b)(1)(B).[3] Of particular concern to the Court in *Bronson* was the fear that adopting a distinction between systemic conditions and isolated acts "would generate additional work for the district courts because the distinction between cases challenging ongoing conditions and those challenging specific acts of alleged misconduct will often be difficult to identify." *Bronson*, at p. 143. No such difficulty presents itself in the case of an isolated sadistic act of violence. There is no claim here that a prison guard who engaged

[3] The Act read, in pertinent part, as follows: "(b)(1) Notwithstanding any provision of law to the contrary – . . .

(B) a judge may . . . designate a magistrate to conduct hearings, including evidentiary hearings, and to submit to a judge of the court proposed findings of fact and recommendations for the disposition, by a judge of the court, . . . of applications for postrial relief made by individuals convicted of criminal offenses and of prisoner petitions challenging conditions of confinement."

in criminal conduct was acting in the course of prison policy, custom or practice; no line-drawing is necessary on the facts presented here.

Similarly, in *Wilson v. Seiter*, 501 U.S. 294 (1991), this Court appears to have rejected a distinction between "short-term or one-time" events and "continuing or systemic conditions." *Id.*, at p. 300. However, the manner in which the Court rejected such a distinction supports the respondent's contention here that a claim of sadistic violence is *sui generis*, and that the character of the act of sadistic violence makes it easy to identify, and removes it from any conceivable universe of affairs that this Court could recognized as a prison condition. By focusing on the intent necessary to make out an Eighth Amendment claim, this Court recognized that some prisoners' claims about the treatment they suffer at the hands of their jailers are not claims about the conditions of confinement. Rather, the salient feature of these claims is the mental state of the tortfeasor. "The long duration of a cruel prison condition may make it easier to *establish* knowledge and hence some form of intent, . . . but there is no logical reason why it should cause the *requirement* of intent to evaporate." *Id.*, at pp. 300-301.[4]

[4] "After incarceration, only the unnecessary and wanton infliction of pain . . . constitutes cruel and unusual punishment forbidden by the Eighth Amendment. To be cruel and unusual punishment, conduct that does not purport to be punishment at all must involve more than ordinary lack of due care for the prisoner's interest or safety. . . . It is obduracy and wantonness, not inadvertence or error in good faith, that characterize the conduct prohibited by the Cruel and Unusual Punishment Clause, whether that conduct occurs in connection with

Bronson is inapplicable for other reasons as well. In *Bronson*, the Court held that the term "conditions of confinement" contained in the Magistrate's Act, 28 U.S.C. § 636(b)(1)(B) includes claims of single incidents of excessive force. *Bronson*, 500 U.S. at 139. As petitioners point out, "the issue raised by Bronson and addressed by the Court was whether the words conditions of confinement includes continuous conditions and excludes isolated incidents." Pet. Br. 14 (quoting *Bronson*, 500 U.S. at 139). The Court did not discuss – let alone decide – the issue presented here. Nothing in *Bronson* requires, or even suggests, that random and unauthorized acts of sadistic violence are ever to be regarded by a court as a condition of confinement.

Petitioners point to the oft-repeated maxim that Congress is presumed to expect its statutes to be read in conformity with the Court's precedents, *see United States v. Wells*, 419 U.S. 482, 495 (1997), to argue that Congress enacted the PLRA against a legal landscape that included *Bronson's* definition of "conditions of confinement." But the PLRA – a statute relating to mainly Eighth Amendment claims by prisoners – was enacted against a much more current and relevant legal landscape than *Bronson* – a landscape that included the recently decided Eighth Amendment decisions in *Hudson* and *Farmer*. Those decisions – issued *after Bronson* was decided and just prior to the passage of the PLRA – make a clear distinction between excessive force and conditions of confinement

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establishing conditions of confinement, supplying medical needs, or restoring official control over a tumultuous cellblock." *Whitley v. Albers*, 475 U.S. 312, 319, 106 S.Ct. 1078, 1084 (1992).

cases and are the proper legal landscape against which to evaluate Congressional intent.

There is an additional reason *Bronson* does not compel a result in favor of respondents. *Bronson* was a Seventh Amendment challenge to the Magistrate's Act, a wholly different constitutional attack on a completely unrelated statute. The principle invoked by petitioners – that Congress is presumed to legislate against the background of this Court's precedent – "does not stretch to cover an . . . interpretation of a statute dealing with a different subject." *Johnson v. United States*, 529 U.S. 694, 726 n.7 (2000) (Scalia, J., dissenting).

Petitioners also rely on *Bronson* for their argument that Congress meant to divide the universe of prison cases into only two categories: (1) habeas corpus actions; and (2) all other prison cases, including those alleging excessive force by prison guards. *See* Pet. Br. 14 (citing *Bronson*, 500 U.S. at 139; *Preiser v. Rodriguez*, 411 U.S. 496, 498-99 (1973)). But as the Court of Appeals below pointed out, "the fact that habeas actions have been excluded from [the PLRA] does not mean that all other claims are necessarily included by negative implication." *Nussle*, 224 F.3d at 103 n.9.

C. Congress' Presumed Familiarity With This Court's Qualified Immunity Doctrine Further Indicates A Lack Of Intent To Require Exhaustion in Cases Involving Random and Unauthorized Acts Of Sadistic Violence

No prison guard can be found liable for excessive force in an Eighth Amendment case unless it can be

proven that the guard's actions were "malicious and sadistic." *Hudson v. McMillian*, 503 U.S. 1, 7 (1992); *Johnson v. Glick*, 481 F.2d 1028 (2d Cir. 1973). A plaintiff must also overcome the affirmative defense that a reasonable guard in the defendant's position could have thought the force involved was appropriate. *See Saucier v. Katz*, 121 S.Ct. 2151, 2159 (2001) (qualified immunity defense applicable to excessive force cases). This affirmative defense of qualified immunity would be applicable in every case in which the force used was indeed a condition of confinement, that is, standard or widespread within the prison, or approved by supervisors. Congress was presumably aware of the defense of qualified immunity when it wrote the PLRA. Therefore, a "conditions of confinement" exclusion would be redundant in an excessive force prison case because ordinarily a guard cannot be liable for a beating that is not random and unauthorized. In other words, a plaintiff can prevail in the face of qualified immunity only for those acts that are not conditions of confinement. As this Court held in *Malley v. Briggs*, 475 U.S. 335, 341 (1986), qualified immunity protects "all but the plainly incompetent or those who knowingly violate the law." A prison guard's actions are objectively unreasonable, and thus unprotected by qualified immunity, only when "no officer of reasonable competence could have made the same choice in similar circumstances." *Lennon v. Miller*, 66 F.3d 416, 420 (2d Cir. 1995).

Congress was aware at the time it crafted the PLRA that there were random and unauthorized acts of sadistic violence in our nation's prisons, and that these acts are not a condition of confinement. Clearly claims arising from such violence are not subject to the exhaustion requirement.

D. The Court Should Not Import The Definition of "Prison Conditions" From A Different Section Of The U.S. Code Into Section 1997e(a)

Petitioners next argue that the Court should import a definition of "prison conditions" that is contained in a wholly different statute, 18 U.S.C. § 3626(g)(2), into Section 1997e(a). Enacted as part of the PLRA, but codified in a different statute altogether, Section 3626 includes the following:

> (g) Definitions. – **As used in this section** –
>
> (2) the term "civil action with respect to prison conditions" means any civil proceeding arising under Federal law with respect to the conditions of confinement or the effects of actions by government officials on the lives of persons confined in prison, but does not include habeas corpus proceedings challenging the fact or duration of confinement in prison.

18 U.S.C. § 3626(g)(2) (emphasis added).

This section's reference to "conditions of confinement" is no more apt to include excessive force than the reference to "prison conditions" in Section 1997e(a) itself, *see Nussle*, 224 F.3d at 102. Petitioners rely heavily on the second category of actions covered by Section 3626(g)(2): "the effects of actions by government officials on the lives of persons confined in prison." The petitioners contend, in effect, that the phrase "the effects of actions by government officials on the lives of persons confined in prison" is mere surplusage, at most a synonym presenting another view of what the term "prison conditions" actually means.

Petitioners' argument fails for several fundamental reasons.

First, the definition of "prison conditions" contained in Section 3626(g)(2), by its own terms, only applies to this section – *i.e.*, 18 U.S.C. § 3626(g)(2).

Second, the definition appears in an entirely different section of the PLRA and is codified in a different statute altogether in the U.S. Code. Respondents counter by arguing that Section 1997e(a) should be read *in pari materia* with 18 U.S.C. § 3626(g)(2) given the canon of statutory construction that language used in one portion of a statute should be deemed to have the same meaning as the same language used elsewhere in the statute. *See Mertens v. Hewitt Assoc.*, 508 U.S. 248, 260 (1993).

But Sections 3626(g)(2) and 1997e(a), enacted by Sections 802 and 803 of the PLRA, respectively, advance entirely distinct statutory purposes. Unlike 42 U.S.C. § 1997e(a), 18 U.S.C. § 3626 is concerned with preventing courts from "micromanaging" prison systems and usurping the authority given to prison administrators to decide matters of routine prison administration. *See Miller v. French*, 530 U.S. 327, 332 (2000); *see also* 141 Cong. Rec. S14317-18 (daily ed. Sept. 26, 1995) (statement of Sen. Abraham) ("No longer will prison administration be turned over to Federal judges for the slightest reason. Instead, the States will be able to run prisons as they see fit unless there is a constitutional violation."). Even if read *in pari materia* the petitioners' argument fails for the simple reason that there is no conceivable universe under the Eighth Amendment that would tolerate, much less require, the management of random and unauthorized

acts of sadistic violence. The conduct at issue here is "off the charts," and the petitioners perhaps concede too much by arguing that it differs perhaps only in degree from tolerable conduct by prison officials.

When the phrase "effects of actions by government officials on the lives of persons confined in prison" is considered in the light of Section 3626's purpose, it is clear that the phrase concerns actions by prison officials that have broad effects on prison policy and administration. The phrase cannot be fairly read to apply to a prisoner's claim of excessive force given that the resolution of such claims by the courts does not ordinarily implicate the routine, orderly administration of prisons.

Given that the two different sections of the PLRA are aimed at two entirely different purposes and are even codified in different parts of the U.S. Code, the normal presumption of statutory construction – that identical words used in different parts of the same statute are presumed to have the same meaning – does not apply. *Atlantic Cleaners and Dyers, Inc. v. United States*, 286 U.S. 427, 433 (1932). As the Court has recognized, where repetitive language creates confusion as to a phrase's meaning in different sections of an act, it is critical that the interpretation of each provision be consistent with Congress' intent. *Id.*

> It is not unusual for the same word to be used with different meanings in the same act, and there is no rule of statutory construction which precludes the courts from giving the word the meaning which the legislature intended it should have in each instance.

Id. at 433; *see also District of Columbia v. Carter*, 409 U.S. 418 (1973) (the phrase "state or territory" might have a different meaning under 42 U.S.C. § 1982 than under 42 U.S.C. § 1983), *Dewsup v. Timm*, 502 U.S. 410 (1992) (the same term might be used differently within two subsections of the same section of the Bankruptcy Code).

In the light of the purpose of Section 3626, moreover, the term "government officials" used Section 3626(g)(2) is "most plausibly understood to refer to administrative and policymaking officials, rather than those prison employees, such as the corrections officers alleged to have used excessive force against Nussle, who have day-to-day contact with inmates but no administrative or policymaking authority." *Nussle*, 224 F.3d at 104. As the court below pointed out, a similar use of the term "official" in a different part of Section 3626 supports this conclusion. Section 3626(a)(3)(F), which addresses the issuance of prison release orders, confers standing to oppose such orders on any "State or local official" whose "jurisdiction of function" includes the appropriation of funds for prison facilities; the construction, operation, or maintenance of those facilities; or the prosecution or custody of prisoners who might be released under such orders. Like in Section 3626(g)(2), this use of the word "official" in Section 3626(a)(3)(F) clearly refers to those prison officials with administrative or policymaking authority.

As the court below also pointed out, the institutional reform actions to which 18 U.S.C. § 3626 is aimed were targeted at senior officials, such as wardens, superintendents, and state-wide commissioners. Likewise, the prospective relief to which Section 3626 is addressed

typically took the form of consent decrees between classes of inmates and these high-level officials, or injunctions mandating action at the policymaking levels of government. Section 3626 has no applicability to the actions of low-level prison guards.

Finally, even if 18 U.S.C. § 3626's definition of "prison conditions" were to apply to 42 U.S.C. § 1997e(a)'s use of the same phrase, the phrase "the effects of actions by government officials on the lives of prisoners" does not clearly encompass excessive force claims. As Judge Noonan of the Third Circuit has pointed out, the phrase makes no sense when used to apply to allegations of excessive force:

> A guard hits you on the mouth. Would you report the blow by saying, 'A government official has taken an action having an effect on my life?' No speaker of English would use such circumlocution. Why should we attribute such circuitousness to Congress? When bones are broken or mouths are mauled, no one on earth, educated or uneducated, would use such phraseology to express the blow.

Booth v. Churner, 206 F.3d 289, 302 (3d Cir. 2000) (Noonan, J., concurring and dissenting) (*rev'd on other grounds*, *Booth v. Churner*, 121 S.Ct. 1819 (2001); *cf. Booth*, *id.* at 1824 (noting it would be "very strange usage" to say that a prisoner must "exhaust" an administrative order before a prisoner could go to court). No matter what linguistic gymnastics are employed, a vicious, random and unauthorized beating by a prison guard simply cannot be fairly described as an "action by a government official having an effect on the life of a prisoner."

In sum, the Court should decline petitioners' invitation to import the 18 U.S.C. § 3626(g)(2) definition of "civil actions with respect to prison conditions" into 42 U.S.C. § 1997e(a), given the limitation expressly contained in Section 3626(g), the distinct statutory purposes advanced by the two provisions, and the text itself of Section 3626(g)(2)'s definition.

IV. THE PLRA'S LEGISLATIVE HISTORY SUGGESTS THAT SECTION 1997e(a) DOES NOT APPLY TO CLAIMS OF EXCESSIVE FORCE

The legislative history of the PLRA suggests that Congress understood the term "prison conditions" in the same manner the term is used in this Court's Eighth Amendment jurisprudence when it amended Section 1997e(a). According to Senator Abraham, a PLRA sponsor:

> [L]awsuits over **prison conditions** have included disputes over how warm the food is, how bright the lights are, whether there are electrical outlets in each cell, whether windows have been inspected and certified up to code, whether prisoners' hair is cut by only licensed barbers, and whether air and water temperatures are comfortable.

Hearing before the Committee on the Judiciary, "Prison Reform, Enhancing the Effectiveness of Incarceration," S. Hrg. 104-573, p. 5 (July 27, 1995) (emphasis added); *see also* 141 Cong. Rec. S14418 (daily ed. Sept. 27, 1995) (statement of Sen. Kyl) (discussing courts' alleged micromanagement of prison conditions to determine "how warm the food is; second, how bright the lights are; third,

whether there are electrical outlets in each cell; fourth, whether windows are inspected and up to code; fifth, whether prisoners' hair is cut only by licensed barbers; and sixth, [sic] whether air and water temperatures are comfortable.").

The PLRA's legislative history confirms the distinction evident throughout the Court's prisoner-rights cases: a claim challenging conditions of confinement is different from one alleging excessive force. There is nothing in the legislative history suggesting that Congress intended random and unauthorized sadistic violence to be treated as a prison condition. Indeed, the record is rife with examples of what Congress sought to deter – complaints about food, clothing, bedding, and the uniform terms and conditions of prison life. This effort by the petitioners to trivialize and diminish this Court's work in securing the rights of prisoners and drawing crucial distinctions between important Constitutional rights and the ephemera of prison administration ought to be rejected. If Congress meant to include sadism and violence in its list of conditions of confinement surely the record would reflect at least one passing reference to this intent. Against the backdrop of this Court's Eighth Amendment jurisprudence, the only conclusion that can and should be drawn by this Court is that exhaustion is not required for cases involving criminal behavior. If this is not what Congress intended, it can easily amend the PLRA to set the record straight.

CONCLUSION

The language and structure of 42 U.S.C. § 1997e(a), together with the Court's well-established Eighth Amendment jurisprudence, are fundamentally incompatible with the interpretation of Section 1997e(a) advanced by petitioners. By far the more coherent interpretation of the phrase "actions . . . with respect to prison conditions" is that it refers to the everyday living conditions endured by prison inmates, not to random, unauthorized and vicious beatings by prison guards. The Court of Appeals' decision should be affirmed.

Respectfully submitted,

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